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In The

# Supreme Court of the United States

October Term, 1996

HARBOR TUG AND BARGE COMPANY,

*Petitioner,*

-against-

JOHN PAPAI AND JOANNA PAPAI,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

- (1) Can a vessel-based harbor-worker sue for seaman's remedies after an Administrative Law Judge has formally determined that he was an LHWCA beneficiary, and therefore not a "member or a crew" at the time of his injury?
- (2) Can a "casual" maritime worker, injured in the course of an ordinary union dispatch, base his seaman status on his overall work history out of that union, or must he limit the inquiry to his specific assignment at the moment of injury?

**PARTIES TO THE ACTION**

**Plaintiffs/Respondents:**

**John Papai and Joanna Papai**

**Defendant/Petitioner:**

**Harbor Tug and Barge Company**

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## INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon the navigable waters of the United States. They work as deep sea divers, diver tenders, piledrivers, barge workers, carpenters, riggers, welders, and marine platform builders. They work on rivers, in harbors, and upon or beneath the high seas. They construct piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They perform those tasks from crane ships, dive vessels, derrick barges, dredges, tugs and other special purpose construction vessels owned or operated by their employers. Their work "*necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."<sup>1</sup> This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")<sup>2</sup> and the Jones Act.<sup>3</sup> We respectfully submit that this status gives them an abiding interest in the question for review.

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<sup>1</sup> *Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir.1984) [original emphasis].

<sup>2</sup> E.g., *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

<sup>3</sup> *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

## SUMMARY OF ARGUMENT

Sailing, as it does, in the wake of *McDermott International, Inc. v. Wilander*<sup>4</sup>, *Southwest Marine, Inc. v. Gizoni*<sup>5</sup> and *Chandris, Inc. v. Latsis*,<sup>6</sup> this case not only bears us back into "occupied waters" long "dominated by federal statute",<sup>7</sup> but requires us to thread the tricky channel that runs between the Jones Act<sup>8</sup> and the LHWCA.<sup>9</sup> Nailing the banners of mutual exclusivity and election of remedies to the mast, *petitioner Harbor Tug & Barge ("HTB") and its amici* surge through those statutes under all plain sail, and urge the Court to cut injured maritime workers off from their traditional seaman's remedies whenever a federal administrative law judge has awarded them interim LHWCA benefits. Turning a blind eye on the day-to-day realities of casual waterfront work, they next insist that the "fact specific" inquiry into seaman status<sup>10</sup> should ignore a union hand's overall work history and focus solely on the narrow job to which he or she was dispatched on the day of the accident. The UBCJA respectfully submits that these arguments misinterpret the letter and logic of both the Jones Act and the LHWCA.

We all begin our voyage with the inarguable proposition that the Jones Act and the LHWCA are "a pair of mutually exclusive remedial statutes".<sup>11</sup> What is more, we all concede the "salutary principle" that both statutes "must be read in the light of the mischief to be corrected and the end to be attained."<sup>12</sup> Indeed, we even all agree that both statutes must be construed "liberally", "flexibly" and "expansively" in order to extend their remedial coverage.<sup>13</sup> But in the end, we seem to be looking at the problem through different ends of the telescope.

Relying primarily on recent Fifth Circuit authority,<sup>14</sup> and showing remarkably little sympathy for what the older Fifth Circuit cases referred to as "the difficulties faced by injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive but which seem in practice to frequently overlap each other's borders",<sup>15</sup> HTB and its *amici* take the narrow, doctrinal view that, quite apart from considerations of collateral estoppel, "the plain meaning of [LHWCA] § 905(a) and the expressed Congressional intent is that a claimant who is

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<sup>4</sup> 498 U.S. 33 (1991).

<sup>5</sup> 502 U.S. 81 (1991).

<sup>6</sup> \_\_\_\_ U.S. \_\_\_\_ 115 S.Ct. 807, 112 L.Ed.2d 111 (1995).

<sup>7</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

<sup>8</sup> 46 U.S.C. § 688.

<sup>9</sup> 33 U.S.C. §§ 901 et seq.

<sup>10</sup> *Wilander, supra*, 498 U.S. at 356.

<sup>11</sup> *Wilander, supra*, 498 U.S. at 353.

<sup>12</sup> *Wilander, supra*, 498 U.S. at 349 quoting *Warner v. Goltra*, 293 U.S. 155, 158 (1934). See also, *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940).

<sup>13</sup> *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 258 (1977) [LHWCA]; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926) [Jones Act].

<sup>14</sup> E.g., *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992); *Fontenot v. AWI, Inc.*, 923 F.2d. 1127 (5th Cir. 1991).

<sup>15</sup> *Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

awarded benefits under the LHWCA is precluded from seeking other remedies against his employer."<sup>16</sup> The UBCJA, on the other hand, agrees with Professor Schoenbaum, and espouses the broader, more pragmatic view that, "In reality, as *Gizoni* proves, there is overlap between the two Acts, and if a worker falls into both categories, he can opt for whichever remedy is more lucrative or suitable, which will virtually always be seaman status."<sup>17</sup> In fact, the overlap probably dates at least as far back as *Reed v. the S.S. YAKA*.<sup>18</sup> To quote one of the leading circuit court cases on point, "If the claimant is not simply substituting in a single phase of a seaman's duties, but is a member of the crew, we see no reason why under YAKA, despite receipt of compensation, he may not also sue his employer under the Jones Act."<sup>19</sup> This, of course, serves the most "important purpose of the compensation statute, to provide immediate relief to an injured employee",<sup>20</sup> without abridging the primary object of the Jones Act, to protect those who do business on great waters from "the perils of the sea."<sup>21</sup> As Professor Larson teaches:

"The community has decided that injured workmen and their families shall have as a minimum

<sup>16</sup> *Brief of Petitioner*, p. 20.

<sup>17</sup> 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed.) § 6-9, p. 260.

<sup>18</sup> 373 U.S. 410 (1963).

<sup>19</sup> *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360, 364 (4th Cir. 1969).

<sup>20</sup> *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360, 364 (4th Cir. 1969).

<sup>21</sup> *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2195.

the security that goes with non-fault compensation. It is not for the individual, once he is part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his first move, perhaps fully intending to follow this with a Jones Act action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimal social insurance protection that he may be entitled to. If it turns out later that he is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done."<sup>22</sup>

The petitioner's and the UBCJA's respective views of the seaman status question diverge down a similar cross-road. Turning their backs on the well settled principle

<sup>22</sup> 4 Larson, *Workmen's Compensation Law*, Section 90.51, p. 16-366 to 16-367 (1983).

that, "The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole",<sup>23</sup> HTB and its *amici* insist that "seaman status must be based upon the claimant's work assignment when injured."<sup>24</sup> The UBCJA contends that this approach not only looks at that problem through a keyhole, but varnishes it with "a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his [or her] regular duties."<sup>25</sup>

WHEREFORE we respectfully urge this Court to affirm the decision below.

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## ARGUMENT

### I.

#### UNION MARITIME WORKERS, LIKE JOHN PAPAI, SHOULD BE ABLE TO EXERCISE THEIR TRADITIONAL STATUTORY AND COMMON LAW RIGHTS AS SEAMEN EVEN AFTER AN ADMINISTRATIVE LAW JUDGE HAS AWARDED THEM WORKERS' COMPENSATION BENEFITS UNDER THE LHWCA.

##### 1. Despite the Statutes' Mutual Exclusivity, the Maritime Law Has Always Permitted Vessel-Based Harbor Workers to Pursue Parallel Jones Act and LHWCA Claims for the Same Injury.

The history of these two statutes has been told well and often elsewhere.<sup>26</sup> We won't rehash it here except to reiterate that, while they have always been mutually exclusive, the courts have long recognized "that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts."<sup>27</sup> Quite apart from that decades-old "zone of uncertainty", after *Southwest Marine, Inc. v. Gizoni*<sup>28</sup> the lower courts quickly recognized that "some maritime workers may be Jones Act seamen who are injured while also performing a job specifically enumerated under the LHWCA, and, therefore, are entitled to recovery under both statutes, although double recovery of any

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<sup>23</sup> *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980).

<sup>24</sup> *Brief of Petitioner*, p. 39.

<sup>25</sup> *Longmire v. Sea Drilling Corp.*, *supra*, 610 F.2d at 1347.

<sup>26</sup> See, e.g., *Wilander*, *supra*, 498 U.S. at 341-354; *Northeast Marine Terminals Co., Inc. v. Caputo*, *supra*, 432 U.S. at 256-273; Gilmore & Black, *The Law of Admiralty* (2d ed.) 404-455; Baer, *Admiralty Law of the Supreme Court* (3d ed.) 132-300.

<sup>27</sup> *Simms*, *supra*, 709 F.2d at 411.

<sup>28</sup> *Supra*.

damage element is precluded.<sup>29</sup> It is therefore well established that “[t]here is nothing sinister about a worker who claims to be physically disabled from injuries incurred during his employment, attempting either personally or through counsel, to obtain recovery by whatever lawful remedy or remedies are available to him.”<sup>30</sup> This is especially true in an age of congested dockets and delayed litigation.<sup>31</sup> Without access to interim LHWCA benefits, workers like John Papai might have to subsist on “maintenance and cure”. That sclerotic remedy dates back to the shipowner’s gothic obligation to provide injured seamen with lodging, a nurse, a candle and food,<sup>32</sup> and can condemn 20th century families to as little as \$8.00 a day in provisional benefits.<sup>33</sup> Worse still, unlike LHWCA benefits, which succor both temporary<sup>34</sup> and permanent conditions,<sup>35</sup> the right to maintenance and cure expires altogether as soon as the injured seaman reaches “maximum medical cure” – whether or not he or she is able to return to work.<sup>36</sup> As Professors Gilmore and

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<sup>29</sup> *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995).

<sup>30</sup> *Boatel, Inc. v. Delamore*, 379 F.2d 850, 854 (5th Cir. 1967).

<sup>31</sup> See, gen., *Report of the Federal Courts Study Committee* (April 2, 1990) pp. 4-10.

<sup>32</sup> Gilmore & Black, *supra*, 281; 1 Benedict on Admiralty (7th ed.) 1-20.

<sup>33</sup> *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

<sup>34</sup> 33 U.S.C. § 908(b).

<sup>35</sup> 33 U.S.C. § 908(a).

<sup>36</sup> *Wood v. Diamond M Dredging Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982). See, also, *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Farrell v. U.S.*, 336 U.S. 511 (1949).

Black observed, there is thus no real downside to allowing seamen to collect modern workers’ compensation while their Jones Act claims are pending.<sup>37</sup> As they put it, “It is only because of a series of accidents in our legal history that the payment of medical expenses and a living allowance to an injured worker is thought to be entirely consistent with his [or her] damage recovery if the payment is called maintenance and cure but inconsistent with the damage recovery if it is called compensation.”<sup>38</sup> What is more, as we’ll discuss in what follows, injured waterfront workers like John Papai must turn perforce to the LHWCA when their employers (and/or erroneous lower court rulings) refuse to recognize their Jones Act status. In light of all these harsh realities, the maritime law has always permitted waterfront workers like John Papai to pursue successive LHWCA and Jones Act remedies for the same injury.<sup>39</sup>

This, of course, raises inevitable collateral considerations. HTB and its *amici* try to wield those collateral considerations, like a scythe, to cut injured waterfront workers off from their historic seaman’s rights. But this Court has traditionally used them as a shield to shelter workers who “are by the peculiarity of their lives liable

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<sup>37</sup> Gilmore & Black, *The Law of Admiralty* (2d ed.) 435.

<sup>38</sup> *Id.*

<sup>39</sup> See e.g., *Reed v. The S.S. YAKA*, *supra*; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991); *Boatel, Inc. v. Delamore*, 379 F.2d 850 (5th Cir. 1967); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Biggs v. Norfolk Dredging Co.*, *supra*; *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C.Ha. 1982); *Lewis v. Roland E. Trego & Sons*, 359 F.Supp. 1130 (D.C.Md. 1973).

to sudden sickness from changes of climate, exposure to perils, and exhausting labor.' "<sup>40</sup>

Without putting too fine a point on it, "The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties and liabilities in the sea-service, which do not belong to home pursuits."<sup>41</sup> Those peculiar rights and privileges are woven deeply into the issues we're discussing here. For example, notwithstanding their mutual exclusivity, it is " 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act".<sup>42</sup> In fact, where the evidence is enough to send the threshold seaman question to a jury, this Court has ruled that it is reversible error to permit the employer to prove that the worker accepted LHWCA benefits while waiting for trial.<sup>43</sup>

It is equally well established that injured waterfront workers cannot summarily cut themselves off from the Jones Act by filing an administrative application for LHWCA benefits.<sup>44</sup> The law in this area "tolerates no

distinction between the mere availability or voluntary payment of compensation and a positive claim for it."<sup>45</sup> As the cases explain:

"[N]ot to allow suit where compensation has been affirmatively sought would discourage the spontaneous initiation of payments. Under such a policy the employer who immediately and voluntarily begins compensation payments would be subject to suit; the employer who forces his employee to seek compensation would be immune from suit."<sup>46</sup>

In short, it was wrong of HTB and its *amici* to suggest that Congress intended the "exclusive remedy" provisions in § 905(a) of the LHWCA<sup>47</sup> to estop all vessel-based harbor workers from pursuing their potential Jones Act rights. To begin with, as this Court has repeatedly ruled, far from erecting an impervious barrier to a harbor worker's historic seaman's remedies, § 905(a) wasn't even designed to bar them from suing their vessel-owning employers for "dual capacity" negligence.<sup>48</sup> More importantly, HTB's blanket insistence that Congress drew up § 905(a) to confine harbor workers like John Papai to the LHWCA overlooks the fact "the LHWCA and its exclusionary provision do not apply to a harbor worker who is also a 'member of a crew of any vessel,' a phrase that is a

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<sup>40</sup> *Chandris, supra*, 115 S.Ct. at 2183 quoting *Harden v. Gordon*, 11 F.Cas. 480, 485 (CC Me. 1823).

<sup>41</sup> *Id* at 2195 [Stevens J. concurring].

<sup>42</sup> *Gizoni, supra*, 502 U.S. at 91. See also, *Simms, supra*, 709 F.2d at 412.

<sup>43</sup> *Gizoni, supra*; *Tipton v. Socony Mobil Oil*, 375 U.S. 34, 37 (1963). See, also, *Eichel v. New York Central R.R. Co.*, 375 U.S. 253 (1963); *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986).

<sup>44</sup> *Simms, supra*, 709 F.2d at 411-412; *Biggs, supra*, 360 F.2d at 364.

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<sup>45</sup> *Biggs, supra*.

<sup>46</sup> *Id.*

<sup>47</sup> 33 U.S.C. § 905(a).

<sup>48</sup> *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Reed v. S.S. YAKA, supra*. See also, *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381 (2d Cir. 1993); *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 689, 795 (2d Cir. 1979).

'refinement' of the term 'seaman' in the Jones Act."<sup>49</sup> Thus, as *Gizoni* patiently explains, while employers and their carriers have an obvious interest in forcing injured waterfront workers to queue up behind one statute or the other, "the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA."<sup>50</sup> In sum, HTB and its *amici* shook hands with a tar baby when they embraced *Sharp v. Johnson Bros. Corp.*,<sup>51</sup> and suggested that *any* award of LHWCA benefits automatically bars a subsequent Jones Act claim.

## **2. The Sweeping Conclusion in *Sharp v. Johnson Bros. Corp.*, that Any LHWCA Award Automatically Bars a Subsequent Jones Act Claim, Does Not Deserve the Supreme Court's Imprimatur.**

The *Sharp* case essentially held that an LHWCA "settlement constituted an election of remedies and precluded the filing of a suit based upon general maritime law or the Jones Act"<sup>52</sup> even though "LHWCA coverage was never litigated in an adversarial proceeding."<sup>53</sup> Noting that such settlements must be approved by the

Department of Labor pursuant to 33 U.S.C. § 908(i) of the Act,<sup>54</sup> the Fifth Circuit concluded that the vessel-based harbor worker in that case had somehow forsaken his rights as a seaman simply by availing himself of the LHWCA's "statutory machinery to bargain for an [interim] award."<sup>55</sup> This result created bad law for several reasons.

For starters, this was the second time that the Fifth Circuit had entertained this case on appeal,<sup>56</sup> and it was sufficiently "distressed" over the attorneys' failure to disclose their LHWCA settlement during the first proceeding to admonish them, right in the published opinion, that "candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation."<sup>57</sup> Given the harshness of their ultimate ruling, we can't help but wonder whether that distress spilled over into the Court of Appeal's reasoning. That reasoning is otherwise very hard to explain.

For example, *Sharp* paid nothing but lip service to the older Fifth Circuit cases on point, like *Simms v. Valley Line Co.*<sup>58</sup> and *Boatel, Inc. v. Delamore* (which specifically ruled against "a finding of collateral estoppel", in a situation very similar to the one in *Sharp*, because "the issue of whether the Longshoremen's Act properly covered this employee was not raised by the parties nor was evidence

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<sup>49</sup> *Gizoni*, *supra*, 502 U.S. at 87.

<sup>50</sup> *Id.* at 91-92 citing 33 U.S.C. § 903(e).

<sup>51</sup> *Supra*.

<sup>52</sup> *Id.*, 973 F.2d at 425.

<sup>53</sup> *Id.* at 426.

<sup>54</sup> 33 U.S.C. § 908(i).

<sup>55</sup> *Sharp*, *supra*.

<sup>56</sup> See *Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990).

<sup>57</sup> *Sharp ("II")*, *supra*, 973 F.2d at 427 fn. 3.

<sup>58</sup> *Supra*.

taken on this subject, though it was in the mind of the Deputy Commissioner since he had informally discussed it with claimant a month prior to the hearing but did not pursue the matter because neither party had raised the issue."<sup>59</sup> More importantly though the opinion was couched in terms of "collateral estoppel", and spoke of the settlement decree as a "formal award", it is actually anchored in the rocky ground of election. As *Sharp* summed up:

"Congress did not intend that the worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a 'stepping stone on the way to a jury award.' *Fontenot*, 923 F.2d at 1133."<sup>60</sup>

In point of fact, Congress did not intend that the worker be put to any elections.

"Broadly, an election of remedies is the act of choosing between two or more different and coexisting methods of procedure and relief allowed by law on the same set of facts."<sup>61</sup> It's equitable in nature, and constitutes a procedural or administrative doctrine, not a rule of substantive law.<sup>62</sup> But as LHWCA opinions from every level of decision have confirmed, "in the absence of express legislative declaration to the contrary, the courts

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<sup>59</sup> *Supra*, 379 F.2d at 854.

<sup>60</sup> *Sharp, supra*, 973 at 426.

<sup>61</sup> "Election of Remedies" §§ 1-3, 25 Am Jur 2d. 761-762 (1996).

<sup>62</sup> *Id.*

have been reluctant to extend this relatively harsh doctrine."<sup>63</sup> There are no such declarations in the LHWCA. To the contrary, as originally drafted back in 1927, the Act required longshoremen and harbor workers "to choose between the receipt of a compensation award from [their] employer and a damage suit against the third party. Act of Mar. 4, 1927, § 33, 44 Stat. 1440."<sup>64</sup> But as this Court has repeatedly noted:

"In 1959, Congress amended the Act to delete the election-of-remedies requirement altogether. Act of Aug. 18, 1959, 73 Stat. 391. Existing law was felt to 'wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party.' S.Rep.No. 428, 86th Cong., 1st Sess., 2 (1959), U.S. Code of Cong. & Admin.News, p. 2134. The result was that an injured employee 'usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit.' *Id.*, U.S. Code Cong. & Admin.News, p. 2134."<sup>65</sup>

Almost fifty years later, the same may be said of John Papai, Ernest Sharp, or any other vessel-based harbor worker who "elects" to take an interim compensation settlement while he and his family are waiting for their Jones Act case to come to trial. The *Sharp* opinion ignores

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<sup>63</sup> *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1277 (4th Cir. 1978).

<sup>64</sup> *Bloomer v. Liberty Mutu. Ins. Co.*, 445 U.S. 74, 79 (1980).

<sup>65</sup> *Id.* at 80 [other citations omitted]. See also, *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 535-537 (1983).

this blunt reality. As this Court observed in *Gizoni*, "We find no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in district courts."<sup>66</sup> In sum, the *Sharp* opinion erred when it read the LHWCA to comprise an implicit election. That opinion does not deserve a Supreme Court imprimatur.

### **3. Nor Should a Fully Litigated LHWCA Award Necessarily Collaterally Estop Vessel-Based Harbor Workers Like John Papai from Pursuing their Jones Act Rights.**

It is clear, then "that compensation statutes are not intended to deprive a seaman or his [or her] replacement of his [or her] historic rights."<sup>67</sup> Once we've steered past *Sharp* and the doctrine of elections, we're back in district court where the "[r]ules of civil pleading allow alternative claims by the use of distinction and alternative counts, *n'importe* their inconsistency."<sup>68</sup> As we've already seen, there is nothing "sinister" or inequitable<sup>69</sup> about prosecuting inconsistent claims under the LHWCA and the Jones Act provided the plaintiff advises both the Department of Labor and the employer that he or she intends to pursue alternative counts, so that "applicant and counsel would have been altogether candid with the agency, and the employer would be protected from

duplication of payment by being advised through notice to withhold the sums paid by any judgment."<sup>70</sup>

"When the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered," however, "a far more formidable defense looms, that of *res judicata* or collateral estoppel."<sup>71</sup> Though *Wilander* instructs that the findings of the Department of Labor are conclusive<sup>72</sup>, even today "the extent to which collateral estoppel and *res judicata* will be applied to a Jones Act suit following a formal Board finding of non-seaman status and an award of benefits appears to be a matter of first impression [before this Court] (and one about which the commentators suggest there is uncertainty)."<sup>73</sup> As Gilmore and Black summed up:

"Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman. But the plaintiff who attempts to bring a Jones Act action following a compensation

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<sup>66</sup> *Gizoni, supra*, 502 U.S. at 90.

<sup>67</sup> *Biggs, supra*, 360 F.2d at 364.

<sup>68</sup> *Id.*

<sup>69</sup> See *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2nd Cir. 1963).

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<sup>70</sup> *Biggs, supra*, 360 F.2d at 365-366.

<sup>71</sup> 4 Larson, *Workmen's Compensation Law*, § 90.51, pp. 16-357 to 16-367 (1983).

<sup>72</sup> *Wilander, supra*, 111 S.Ct. at 818.

<sup>73</sup> *Simms, supra*, 709 F.2d at 412.

award in a contested proceeding may find himself barred in a court which takes *res judicata* and collateral estoppel seriously.”<sup>74</sup>

The question at bar, of course, is how seriously *this Court* intends to take *res judicata* and collateral estoppel when it comes to administrative judgments like the one received by John Papai.

As Your Honors already explained in *U.S. v. Utah Construction & Mining Co.*:

“Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”<sup>75</sup>

Under the *Utah Construction* test, if it appears from the record that the administrative tribunal in question, (1) had jurisdiction over the case, (2) “was acting in a judicial capacity,” and (3) resolved factual disputes that “were clearly relevant to issues properly before it,” this Court has traditionally given its determinations collateral effect so long as “both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.”<sup>76</sup>

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<sup>74</sup> Gilmore & Black, *supra*, at 435.

<sup>75</sup> 384 U.S. 394, 421-422 (1966).

<sup>76</sup> *Id.* at 422.

The UBCJA does not dispute that the administrative law judge in this case had jurisdiction over Papai’s LHWCA claims, or that he was acting in a judicial capacity. The LHWCA and Department of Labor regulations, after all, have vested the Office of Federal Administrative Law Judges with adjudicative jurisdiction over all long-shore claims,<sup>77</sup> and 33 U.S.C. § 919(c) of the statute expressly incorporates the “trial-like” procedures spelled out in the Administrative Procedures Act.<sup>78</sup> We do, however, query whether “both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse rulings.”

Eschewing the rule in *Sharp*, and noting that “[c]ollateral estoppel bars a party from relitigating an issue if (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action,” the Ninth Circuit refused to bar a vessel-based harbor worker from prosecuting his Jones Act rights in *Figueroa v. Campbell Industries*, even though he’d already received a formal award under the LHWCA, because the administrative “record does not reflect an express finding by anyone that Mr. Figueroa was not a ‘master or member of a crew’ for purposes of the LHWCA.”<sup>79</sup> The assertion that the claimant was a “master or a member of a crew”, after all, is an affirmative defense which will be waived unless it’s

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<sup>77</sup> 33 U.S.C. § 919(a); 20 CFR §§ 702.301 *et seq.*

<sup>78</sup> 5 U.S.C. §§ 500 *et seq.*

<sup>79</sup> 45 F.3d 311, 315 (9th Cir. 1995).

raised by the employer or its LHWCA carrier.<sup>80</sup> As *Figueroa* explains, "Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim."<sup>81</sup> It follows that an employer like HTB cannot rely on administrative collateral estoppel to bar a subsequent Jones Act claim unless it has specifically alleged, litigated and *lost* the crew member issue in the LHWCA proceeding. This, of course, not only begs the confounding tactical, equitable and even ethical considerations that populate the "through-the-looking-glass" situation where an employer's Jones Act carrier wants its insured to "lose" the LHWCA case while the LHWCA carrier wants to win it;<sup>82</sup> it brings us directly to the central question of this appeal. Can we conscientiously conclude that both parties to an LHWCA claim "had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse rulings" where, as here, neither party really wants to "win"? The UBCJA respectfully submits that the answer to that question can only be "No."

That, of course, is why the Ninth Circuit held, in this case that "the plaintiff's litigation of his LHWCA claim does not bar his subsequent Jones Act claim" even though the ALJ had denied the employer's half-hearted "crew member" defense.<sup>83</sup> Indeed, when we reflect that the district court had summarily (albeit erroneously) dismissed Mr. Papai's Jones Act claims *before* the LHWCA case was even called to trial, we begin to appreciate how confounding the petitioner's arguments really are. It is obvious, for example, that after the Jones Act carrier had already established that Papai was a longshore harbor worker before the federal district court, the employer's LHWCA attorney was equitably estopped from arguing otherwise before the federal administrative law judge.<sup>84</sup> It is equally obvious that, if he had himself heeded the tenets of collateral estoppel, the federal administrative law judge would have never re-litigated Mr. Papai's crew member status in the wake of the district court's ruling. Though the ALJ reportedly declined to do so because the district court's ruling was either interlocutory or still on appeal, "The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*."<sup>85</sup> In short, far from

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<sup>80</sup> *Lazzari v. Matson Navigation Co.*, 29 Ben.Rev.Bd.Serv. 521 (ALJ), 524(ALJ) (1995).

<sup>81</sup> *Id. citing Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D.La. 1965).

<sup>82</sup> Note, "Looking For A Lodestar Among the Rocks and Shoals of Longshore Coverage" 3 U.S.F.Mar.L.J. 227, 261-262 (Sum. 1991).

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<sup>83</sup> *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 208 (9th Cir. 1995).

<sup>84</sup> *Roth v. McAllister Bros., Inc.*, *supra*, 316 F.2d at 146.

<sup>85</sup> 1B Moore's Federal Practice (2d ed.) ¶ 0.416[3], pp. 521-522. See also, *Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C.Cir. 1983).

foreclosing Mr. Papai's subsequent Jones Act claims through administrative estoppel, the LHWCA tribunal should have never even considered the "crew member" issue.

At all events, the schizophrenic positions assumed by the employer and its lawyers clearly supports the Ninth Circuit's view that "a bar to relitigation would not serve the purpose for which it is usually employed since the parties are forced to take inconsistent positions under the Jones Act and the LHWCA".<sup>86</sup> That view seems more appropriate still when we consider Mr. Papai's plight. After the district court had dismissed his Jones Act claims under Rule 56,<sup>87</sup> this disabled worker likewise lost his interim claim for maintenance. It does not overstate matters too much to suggest that this left him crucified on the horns of a painful dilemma. He could either tighten his belt and forego his interim claims for LHWCA benefits in the hope that, one day, his Jones Act rights would be vindicated, or he could risk losing those rights forever by prosecuting a claim for provisional relief under the LHWCA. Were the doctrine of collateral estoppel as implacable as HTB and its *amici* seem to think, the admiralty courts would have to officiate, like Pilate, as injured workers were condemned by a curious "Catch-22." Without belaboring the matter, "the employer who immediately and voluntarily begins compensation payments would be subject to suit [while] the employer who forces his employee to seek compensation would be

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<sup>86</sup> *Papai, supra*, 67 F.3d at 208.

<sup>87</sup> 28 U.S.C., Fed.R.Civ.Pro. 56.

immune from suit."<sup>88</sup> Given the "peculiar rights, privileges, duties and liabilities" that crowd this corner of the law, and the fact that it's inhabited by the particular "wards of admiralty"<sup>89</sup> (an endangered species if there ever was one), we respectfully submit that the requirements of administrative estoppel could not possibly be that perverse or intractable. In sum, the UBCJA contends that even a fully litigated LHWCA award should not necessarily estop vessel-based workers like John Papai from pursuing their Jones Act rights.

#### **4. The Requirements of "Mutual Exclusivity" Are Met by the Credit Mechanisms Built into Each Statute.**

In the end, careful consideration of the problem confirms that Congress did not make the LHWCA and the Jones Act mutually exclusive just to snare all the harbor workers who are injured in the "zone of uncertainty" with elections or estoppels. As the set off provisions in § 903(e) clearly demonstrate, it made them mutually exclusive to prohibit double recovery. Under those provisions, any amounts paid to an injured waterfront worker pursuant to "46 U.S.C. § 688 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act."<sup>90</sup> While the Jones Act does not expressly contain a corresponding offset, it was passed several years before the LHWCA and is, in any

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<sup>88</sup> *Biggs, supra*, 360 F.2d at 364.

<sup>89</sup> *Chandris, supra*, 115 S.Ct. at 2195 [Stevens J. concurring].

<sup>90</sup> 33 U.S.C. § 903(e). See also, *Gizoni, supra*, 502 U.S. at 91-92.

event, "a statute of the most general terms".<sup>91</sup> Congress therefore left the duty of finishing and fashioning the seaman's Act largely to the courts.<sup>92</sup> Since most courts agree "[t]he order of asking for relief should not be decisive"<sup>93</sup> it is now well-settled that:

"If the plaintiff succeeds in [his subsequent Jones Act] suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies – compensation and suit – are thus made complementary. An important purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved and the injured party's opportunity to press further remedies remains unabridged."<sup>94</sup>

HTB and its *amici* argue that these offsets are imperfect, and that the employer can never really recoup all of its payments. Our learned friends from the Matson Navigation Co. and the Industrial Indemnity Company even suggest that, judging from the ratio of benefits to total costs, workers' compensation remedies like the LHWCA are "74.8%" efficient while tort remedies like the Jones Act are only "43%" efficient.<sup>95</sup> While these arguments and

statistics show that no benefit system can stop all the fiscal leaks, they do *not* alter this Court's foregone conclusion that, porous or not, the statutes' inter-connecting credit mechanism "removes the threat of double recovery," and thus remains the only practical bulwark of mutual exclusivity.<sup>96</sup> In other words, in the complex and imperfect world of maritime personal injury law, so long as vessel-based harbor workers like John Papai are obligated to give vessel-owning employers like HTB an offset for the interim LHWCA benefits they've already received, there are no compelling equitable, doctrinal or collateral reasons for estopping their Jones Act claims.

## II.

### THE "FACT SPECIFIC" INQUIRY INTO A CAUSAL WORKER'S SEAMAN STATUS SHOULD NOT BE CONFINED TO THAT HAND'S ASSIGNMENT AT THE MOMENT OF THE ACCIDENT, BUT SHOULD CONSIDER HIS OR HER OVERALL UNION WORK HISTORY.

Seaman's status, of course, is "a mixed question of law and fact."<sup>97</sup> While attempts to fix "a firm legal significance to such terms as 'seaman', 'vessel', [and] 'member of a crew'" almost invariably come to grief on the facts,<sup>98</sup> after decades of confusion this Court has recently made it

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<sup>91</sup> *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1957).

<sup>92</sup> *Id.*

<sup>93</sup> *Biggs, supra*, 360 F.2d at 364.

<sup>94</sup> *Id.*

<sup>95</sup> *Brief of Industrial Indemnity Company et al.*, p. 13.

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<sup>96</sup> *Gizoni, supra*, 502 U.S. at 92, fn. 5.

<sup>97</sup> *Wilander, supra*, 498 U.S. at 356.

<sup>98</sup> *Estate of Wenzel v. Seaward Marine, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983).

clear that "[t]he key to seaman status"<sup>99</sup> is an employment-related "connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."<sup>100</sup> Admitting that Papai was a Z-card-carrying merchant mariner, that he was a member of the Inland Boatman's Union and that he had received day-to-day, or "casual", union dispatches to a fleet of different tugs, ferries and other vessels, HTB argues that our respondent was not a Jones Act seaman because that fleet was not "under common ownership or control."<sup>101</sup> To put it as politely as possible, this argument takes the so-called "fleet seaman doctrine," and turns it on its head.

Under the "fleet seaman doctrine", an injured worker's "status as a crewmember is determined 'in the context of his entire employment' with his current employer."<sup>102</sup> The doctrine was originally devised by the Fifth Circuit, in a case involving an "ambiguous-amphibious maritime worker",<sup>103</sup> "to ease the requirement that, to be a seaman, the claimant had to be 'assigned permanently to a vessel.'"<sup>104</sup> While it has been applied

to such lubberly plaintiffs as tool pushers<sup>105</sup>, drilling foremen<sup>106</sup>, derrick operators<sup>107</sup>, riggers<sup>108</sup>, sandblasters<sup>109</sup>, mechanics<sup>110</sup>, and even granary workers,<sup>111</sup> until recently it had never been used to deny seaman status to a classic merchant mariner. As the Fifth Circuit pointed out in its lodestar *Barrett* opinion: "We do not decide whether the same principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties [like John Papai] but does his work on short voyages aboard a large number of vessels."<sup>112</sup> Unfortunately, despite this sunny beginning, the "fleet seaman doctrine" underwent a mysterious sea change during the 90's.

For example, in 1991, despite a scathing dissent from one of its leading jurists, the Fifth Circuit concluded that ship's pilots are not seaman because the vessels they steer in and out of port do not comprise an "identifiable fleet"

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<sup>105</sup> *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981).

<sup>106</sup> *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977).

<sup>107</sup> *Liverette v. N.L. Sperry Sun, Inc.*, 831 F.2d 554 (5th Cir. 1987).

<sup>108</sup> *Chauving v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989).

<sup>109</sup> *New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (5th Cir. 1989).

<sup>110</sup> *Braniff, supra*.

<sup>111</sup> *Jones v. Mississippi River Grain Elevator Co.*, 703 F.2d 108 (5th Cir. 1983), cert. den., 464 U.S. 856 (1983).

<sup>112</sup> *Barrett v. Chevron USA, Inc., supra*, 781 F.2d at 1075, fn. 13.

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<sup>99</sup> *Id.* at 498.

<sup>100</sup> *Chandris, supra*, 115 S.Ct. at 2190.

<sup>101</sup> *Petitioner's Brief*, pp. 32-39.

<sup>102</sup> *Barrett v. Chevron, U.S.A., Inc.*, 871 F.2d 1076, 1074 (5th Cir. 1986).

<sup>103</sup> *Braniff v. Jackson Ave-Gretna Ferry, Inc.*, 280 F.2d 523, 525 (5th Cir. 1960).

<sup>104</sup> *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989) quoting *Braniff, supra*, 280 F.2d at 526.

operating under uniform ownership or control.<sup>113</sup> Courts from the Fifth Circuit have since concluded that, even when they plumb the depths for a single employer, deep sea divers – seafarers whose “work necessarily involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land”<sup>114</sup> – lack an employment-related connection to an identifiable fleet when the vessels from which they dive are owned by different companies.<sup>115</sup> The UBCJA respectfully submits that the Ninth Circuit was correct when it refused to read the fleet seaman doctrine so narrowly.<sup>116</sup>

HTB, and the cases on which it relies, have taken the fleet seaman doctrine, and Jones Act law in general, way off course. Deep sea divers, after all, have enjoyed the rights and duties of seamen since 1859.<sup>117</sup> Ship’s pilots

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<sup>113</sup> *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 328 (5th Cir. 1991) [Brown J. dissenting] vacated, 114 L.Ed.2d 706 (1991) reinstated on reconsideration, 947 F.2d 129 (5th Cir. 1991) cert. den., 118 L.Ed.2d 592 (1992). See also, *Harwood v. Partredereit AF*, 944 F.2d 1187, 1194 (4th Cir. 1991) [Ervin C.J. dissenting] cert. den. 118 L.Ed.2d 493 (1982). See also, *Evans v. United Arab Shipping Co., S.A.G.*, 4 F.3d 207 (3d Cir. 1993). Contra see, *Ringerding v. Compania Maritima De-La Mancha*, 670 F.Supp. 301 (D. Or. 1987) aff’d mem., 848 F.2d 1243 (9th Cir. 1988); *Clark v. Solomon Nav. Co., Ltd.*, 631 F.Supp. 1273 (S.D.N.Y. 1986).

<sup>114</sup> *Wallace v. Oceaneering Int’l*, *supra*, 727 F.2d at 436.

<sup>115</sup> *Ashley v. Epic Divers, Inc.*, 818 F.Supp. 172 (E.D.La. 1991); *Gates v. Delta Corrosion Offshore, Inc.*, 715 F.Supp. 160 (W.D.La. 1989). But see, *Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363 (E.D.La. 1994).

<sup>116</sup> *Papai, supra*, 67 F.3d at 206 fn. 3.

<sup>117</sup> See, e.g., *The Highlander*, 12 Fed.Cas. 136 (D. 1859) [salvage diver]; *The Murphy Tugs*, 28 F. 429 (E.D. Mich., 1886)

have been deemed seamen from the earliest days of the Republic.<sup>118</sup> If the Jones Act was truly designed to “‘offset the special hazards and disadvantages to which they who go down to the sea in ships are subjected’”,<sup>119</sup> it is virtually impossible to imagine anyone who deserves its protection more than deep sea divers and ship’s pilots. In the end, the same may be said of Inland Boatman Union members like John Papai.

Lest casual mariners like Mr. Papai ultimately find themselves marooned by a doctrine that was originally designed for oil field hands and granary workers, the UBCJA respectfully urges the Court to consider the Second Circuit’s decision in *Fisher v. Nichols*.<sup>120</sup> The plaintiff in that case, like the respondent in this one, was a career mariner who had worked aboard the vessel that disabled him “for only one day.”<sup>121</sup> He was, in fact, a professional yacht racer who sailed for a host of different owners. Concluding that his “‘entire career up to and including the moment he suffered the injury was dedicated to sea-based work’”, the Second Circuit declined “to adhere slavishly to the ‘fleet doctrine’ found in the case law of some of our sister circuits.”<sup>122</sup> Rules *Fisher*:

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[salvage diver]. See also, *Wallace v. Oceaneering Int’l*, *supra* [oilfield diver]; *Pickle v. Int’l Oilfield*, 791 F.2d 1237 (5th Cir. 1986) [oilfield diver]; *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (5th Cir. 1981).

<sup>118</sup> See e.g., *Wilander, supra*, 498 U.S. at 344.

<sup>119</sup> *Chandris, supra*, 115 S.Ct. at 2191.

<sup>120</sup> 81 F.3d 319 (2d Cir. 1996).

<sup>121</sup> *Id.* at 323.

<sup>122</sup> *Id.*

